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IN THE

Supreme Court of the United States

October Term, 1947
No. 228

JACK EUGENE THOMSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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SUBJECT INDEX

PAGE

Jurisdiction 2

Question presented 2

Statutes involved 3

Statement of the case 5

Reasons for granting the writ 7

Argument 10

Petitioner exhausted the administrative process and was therefore entitled to a decision on the merits of his case 10

A. Army Regulations cannot overrule, for the purpose of setting the point where the administrative process ends, the Selective Training and Service Act and the Regulations thereunder 10

B. The local board's order to report for induction was void because issued in violation of the Selective Service Regulations. Hence it need not have been obeyed 11

C. The concept of the end of administrative process should not be carried to a point of unreasonableness 15

Conclusion 17

TABLE OF AUTHORITIES CITED

CASES **PAGE**

Billings v. Truesdell, 321 U. S. 542.....7, 8, 9, 10, 12
Dodez v. United States, 91 L. Ed. (Adv. Ops.) 282....6, 8, 9, 11, 15
Estep and Smith v. United States, 327 U. S. 114..... 9
Falbo v. United States, 320 U. S. 549.....6, 8, 12, 15, 16
Flakowicz, In re, 146 F. (2d) 874; cert. den. 325 U. S. 851..... 6
Kauten v. United States, 133 F. (2d) 703..... 9
Lilly v. Grand Trunk W. R. Co., 317 U. S. 481..... 7
Midland Realty Co. v. Kansas City Power & L. Co., 300 U. S. 109 7
Paulina, The, v. United States, 7 Cranch. 42, 3 L. Ed. 266..... 11
Tung v. United States, 142 F. (2d) 919.....8, 11
United States v. American Trucking Association, 310 U. S. 534; pet. den. 311 U. S. 724..... 11
United States v. Balogh, 91 L. Ed. (Adv. Ops.) 428.....6, 16
United States v. Downer, 135 F. (2d) 521..... 9
United States v. Zieber, 161 F. (2d) ..... (C. C. A. 3d, 1947).... 11

REGULATIONS

Army Regulation 615-500, par. 15, subpar. (e).....1, 2, 3, 6
Selective Service Regulations, Sec. 629.1 (C. F. R., Supp., 1944, p. 2529, 93 Fed. Reg. 440; 9 Fed. Reg. 7494).....4, 8, 10, 11

STATUTES

Judicial Code, Sec. 240(a) (28 U. S. C. 347(a))..... 2
Selective Training and Service Act of 1940, Sec. 3a (54 Stat. 885, 50 U. S. C. App. 303a, 11 F. C. A., Title 50, Appx. 5).... 3
Selective Training and Service Act of 1940, Sec. 5g (54 Stat. 885, 50 U. S. C., Appx 305g, 11 F. C. A., Title 50, Appx. 5) 4
Selective Training and Service Act of 1940, amended (Public Law 197, Sec. 5, 78th Cong., Dec. 5, 1943, 57 Stat. 577, 50 U. S. C., Appx. 304a, 11 F. C. A., Title 50, Appx. 5)..... .....3, 8, 12, 14

TEXTBOOK

89 Congressional Record, pp. 8079, 8130, 8131..... 13

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This petition for a writ of certiorari seeks a review of a decision of the United States Circuit Court of Appeals for the Ninth Circuit. That court considered an issue raised for the first time on appeal, namely, the effect of sub-paragraph (e) of Paragraph 15 of Army Regulation 615-500 on the question of whether a registrant under the Selective Training and Service Act of 1940 had exhausted his administrative rights where his pre-induction physical examination was held more than 90 days prior to his induction date. On the basis of this consideration the Circuit Court of Appeals decided that petitioner had not ex-

hausted his administrative rights and so could not challenge his classification at the criminal trial for failure to report for induction. The court therefore affirmed the conviction. The judgment of the District Court [R. 7-8, 66-69] and the opinion of the lower court [R. 76-81] are not reported.

Jurisdiction.

The judgment of the United States Circuit Court for the Ninth Circuit was entered April 30, 1947 [R. 81]; and a petition for rehearing was denied on July 2, 1947 [R. 81]. The issue as to which petitioner seeks this court's review involving the construction and effect of sub-paragraph e of Paragraph 15 of Army Regulation 615-500 was decided adversely to petitioner, over his argument, by the Circuit Court [R. 81]. The jurisdiction of this court is invoked under Section 240(a) of the Judicial Code, as amended (28 U. S. C. 347 (a)).

Question Presented.

In regard to a defense to a criminal proceeding for failure to report for induction, is the administrative process under the Selective Service System ended where a registrant has been found acceptable to the armed forces upon the completion of his pre-induction physical examination? Or does sub-paragraph e of Paragraph 15 of Army Regulation 615-500 so modify the process that if the order to report for induction is not given within 90 days after such acceptance, the administrative process is not complete until the registrant reports for induction, is re-examined, and is again found acceptable?

Statutes Involved.

Sub-paragraph e of Paragraph 15 of Army Regulation 615-500 provides:

> "e. Registrants forwarded for induction.—Registrants forwarded for induction will ordinarily have had a pre-induction physical examination within 90 days and will require only a physical inspection. Registrants so forwarded, who have not been previously examined, or who have been previously examined and found not acceptable, or who have been examined and found acceptable more than 90 days previously, will be given a complete examination. The pre-induction physical examination will be void after 90 days from the date of the examination shown on DSS Form No. 221."

The pertinent part of Section 3a of the Selective Training and Service Act of 1940 (54 Stat. 885, 50 U. S. C. App. 303a, 11 F. C. A., Title 50, Appx. 5), provides that:

> ". . . no man shall be inducted for training and service under this Act unless and until he is acceptable to the land or naval forces for such training and service and his physical and mental fitness for such training and service has been satisfactorily determined. . . ."

The Selective Training and Service Act of 1940 was amended by Section 5 of Public Law 197, 78th Cong., December 5, 1943 (57 Stat. 577, 50 U. S. C. Appx. 304a, 11 F. C. A., Title 50, Appx. 5), to provide:

> "Any registrant within the categories herein defined when it appears that his induction will shortly occur shall, upon request, be ordered by his local board in accordance with schedules authorized by the

Secretary of War, the Secretary of the Navy, and the Director of Selective Service, to any regularly established induction station for a pre-induction physical examination, subject to reexaminations.

"The commanding officer of such induction station where such physical examination is conducted under this provision shall issue to the registrant a certificate showing his physical fitness or lack thereof, and this examination shall be accepted by the local board, subject to periodic reexamination. Those registrants who are classified as I-A at the time of such physical examination and who are found physically qualified for military service as a result thereof, shall remain so classified and report for induction in regular order."

And pursuant to that section, Section 629.1 of the Selective Service Regulations (C. F. R. Supplement 1944, p. 2529; 93 Fed. Reg. 440; 9 Fed. Reg. 7494) provided at the time in question:

"Every registrant, before he is ordered to report for induction, shall be given a pre-induction physical examination under the provisions of this part unless (1) he signs a Request for Immediate Induction (Form 219), or (2) he is a delinquent."

On the substantive issues of the case Section 5g of the Selective Training and Service Act of 1940 (54 Stat. 885, 50 U. S. C. Appx. 305g, 11 F. C. A., Title 50, Appx. 5) provides in part:

"Nothing contained in this Act shall be construed to require any person to be subject to combatant training and service in the land or naval forces of the United States who by reason of religious training and belief, is conscientiously opposed to participation in war in any form. . . ."

Statement of the Case.

FACTS—Petitioner registered with Local Board 176, Reseda, California, on April 21, 1943 [R. 23]; he was classified 1-A-O on May 8, 1944 [R. 51] and then reclassified as 1-A on September 6, 1942 [R. 54]. On June 5, 1944, following a pre-induction physical examination he was found physically fit and acceptable by the Army for general military service [R. 47]; he was ordered by his local board to report on May 24, 1945 [R. 28]; petitioner failed to report [R. 56]. Petitioner was tried by a court without a jury, found guilty, sentenced to one year in the penitentiary, and fined $1,000.00 [R. 7-8]. Petitioner did not comply because he felt he had been improperly denied classification as a conscientious objector [R. 55]. It was his belief that when a man joins the army he has to be ready to kill and he did not think he had the right to take another man's life [R. 56]. To him life is sacred and beyond the touch of mortals [R. 56]. Though petitioner was not a member of any recognized Church [R. 56] or a believer in the hereafter [R. 64] he had been taught by his parents since early childhood [R. 57], and his training and belief that life is a gift beyond the power of man to touch is a concept equivalent to the Christian concept of God [R. 59]. His training and belief on the subject of pacifism and participation in war are exemplified by the words "Thou shalt not kill" and by the Golden Rule [R. 61]. He looks upon the life of Christ as a perfect example of the way man should act toward his fellowman. And he believes that were Christ alive today he would have acted as did petitioner here in protesting against war [R. 62].

DECISIONS BELOW—The District Court did not render a written opinion but at the time it announced the verdict and decision from the bench [R. 66-69] expressed the view that it was bound by *In re Flakowicz,* 146 F. (2d) 874, cert. den. 325 U. S. 851. That decision was prior to this court's decision in *Dodez v. United States,* 91 L. Ed. (Adv.) 282, which made it clear that it was not necessary, in order to complete the administrative process, for a registrant to report for induction where he had taken and passed his pre-induction physical examination and had been found acceptable. The trial court then went on to say that in its opinion the board had not been arbitrary in its consideration of petitioner's case but had fairly considered everything he had offered. Further it said that it did not believe petitioner's objection to becoming a member of the armed forces was due to his religious training and belief [R. 69].

The Circuit Court [R. 81] affirmed the judgment of the District Court on the ground that by virtue of sub-paragraph e of Paragraph 15 of Army Regulations 615-500 petitioner had to report for induction before he could be said to have completed the administrative process. The court relied on this court's opinion in *Falbo v. United States,* 320 U. S. 549, and this court's memorandum opinion in *United States v. Balogh,* 91 L. Ed. (Adv.) 428, #800 October Term 1946. Accordingly the court did not consider petitioner's case on the merits.

Reasons for Granting the Writ.

1. The decision of the lower court is in conflict with the decision of this court in *Billings v. Truesdell,* 321 U. S. 542. The lower court's opinion can only be interpreted as saying that a regulation of the Army can have the effect of nullifying the provisions of the Selective Training and Service Act. The *Billings* case was clear to the effect that the regulations of the Army have effect only *after* the registrant is inducted and that up to that time the Act and the Rules and Regulations thereunder are determinative as to when the administrative process ends.

Pursuant to the mandate of the Act the Selective Service Rules and Regulations were promulgated. These rules are of equal force as the law whose purposes they are designed to effect.[1] Thus the mandate is clear in Part 629.1 of the regulations that "every registrant, before he is ordered to report for induction, *shall be given* a pre-induction physical examination under the provisions of this part." (Italics added.) This can only mean an *effective* examination, not an abortive one, for it cannot be presumed that the regulations intended an examination as an idle gesture.

Thus to the extent that the lower court's decision sanctions the rule that the Army Regulation in question can permit an induction order though no effective pre-induction physical examination was given it is directly contra

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[1] *Lilly v. Grand Trunk W. R. Co.,* 317 U. S. 481; *Midland Realty Co. v. Kansas City Power & L. Co.,* 300 U. S. 109.

to the holding in the *Billings* case. For this case held that it is the President, under the Act as effected by the Regulations, who determines who shall be inducted and when the selective process is completed.

2. The decision of the court below is in conflict with the decision of the 1st Circuit in *Tung v. United States,* 142 F. (2d) 919. If by reason of the existence of the Army Regulation in question, a pre-induction examination given more than 90 days prior to the induction date is a nullity, then the local board's order to petitioner to report for induction was an illegal order. This, because it was given without the registrant's having been given the pre-induction physical examination required by Part 629.1 of the Selective Service Regulations. The *Tung* case is clear that a void order need not be obeyed and a conviction based on a void order must be reversed.

3. The decision below is contrary to the decision of this court in *Dodez v. United States,* 91 L. Ed. (Adv.) 282, because it stretches "the requirement of exhausting the administrative process beyond any reason supporting it."

4. The lower court's decision leaves again in confusion the question of when the administrative process under the Selective Service System is completed. It had been supposed, following *Falbo v. United States,* 320 U. S. 459, with the amendments of the Act by the Act of December 5, 1943 (50 U. S. C. App. 303, 304a; 57 Stat. 596, 599)

and with the clarification made by *Billings v. Truesdell,* 321 U. S. 542; *Estep and Smith v. United States,* 327 U. S. 114, and *Gibson and Dodez v. United States,* 91 L. Ed. (Adv.) 282, that a person who felt he had been wrongfully classified could intelligently make the decision as to whether he could report for induction or not. At least up until the instant case he knew that once he had been accepted by the Army, he could, if so disposed, fail to report for induction and have his day in court as to the merits of his classification. Further, the registrant previously knew that if he were ordered to report, he could close his affairs and rest assured he would be inducted. That stability of the law is now changed. He must now report for induction though he has been once accepted, and submit to another examination with the possibility of rejection. The very uncertainty intended to be eliminated by the 1943 Amendments is now circumvented and the rulings in the cases mentioned above are now enmeshed in further uncertainty.

5. On the merits of petitioner's claim his conviction is in conflict with the holding of the Second Circuit in *Kauten v. United States,* 133 F. (2d) 703, and *United States v. Downer,* 135 F. (2d) 521. Both these cases hold that the recognition of religion does not require a belief in a personal God.

ARGUMENT.

Petitioner Exhausted the Administrative Process and Was Therefore Entitled to a Decision on the Merits of His Case.

A. Army Regulations Cannot Overrule, for the Purpose of Setting the Point Where the Administrative Process Ends, the Selective Training and Service Act and the Regulations Thereunder.

In *Billings v. Truesdell,* 321 U. S. 542, this court said (p. 542):

> "Thus, it seems clear, as we have already said, that the Act, rather than the War Department Regulations or the Articles of War, determines the rights and duties of selectees, as distinguished from inducted men. The manner and method of effecting an induction into the Army are thus left for the War Department. But the power of the President under the Act 'to select and induct' men includes the power to determine when the selective process is completed. It is only after that process is finished that a selectee is eligible for induction."

Since Part 629.1 of the Selective Service Regulations provides: "every registrant before he is ordered to report for induction, *shall be given* a pre-induction physical examination," it follows that under the rule of the *Billings* case no Army Regulation could change that requirement. It would seem quite evident that what is meant by a pre-induction physical examination is an examination of full force and effect. It would be unreasonable to interpret the regulation to mean that an examination which was a nullity must be given. Unreasonable or absurd interpre-

tations are to be avoided.[2] Thus to the extent that the Army Regulation in question permits of induction without a valid pre-induction physical examination, it is void and of no force or effect. Hence it must be considered, under the decision of *Dodez v. United States,* 91 L. Ed. (Adv.) 282, that defendant did not have to report for induction he having already completed the administrative process.

B. The Local Board's Order to Report for Induction Was Void Because Issued in Violation of the Selective Service Regulations. Hence It Need Not Have Been Obeyed.

The cases are now many that a local Board's order issued in violation of the Selective Service Act or Regulations is invalid.[3] Hence it need not have been obeyed and a conviction for violation of such an order cannot be permitted to stand.[4]

If it be considered that the Army Regulation in question is to be given the effect that it rendered invalid a pre-induction physical examination given and passed more than 90 days prior, the local Board exceeded its jurisdiction when it ordered petitioner to report for induction more than 90 days after the examination. For the interdict of Part 629.1 of the Selective Service Regulations is clear, concise and unambiguous; the pre-induction physical *must* be given. There is no leeway. (The exceptions in the section are not applicable here.) The reason for this in-

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[2]*United States v. American Trucking Association,* 310 U. S. 534, Pet. Den. 311 U. S. 724; *The Paulina v. U. S.,* 7 Crank 42, 3 L. Ed. 266.

[3]See, *e. g., U. S. v. Zieber,* 161 F. (2d) (C. C. A. 3d, 1947); *Tung v. U. S.,* 142 F. (2d) 919 (C. C. A. 1st, 1944).

[4]See cases cited *supra,* Note 3.

sistence is clear when the history that led to its promulgation is considered.

The *Falbo* case established the broad principle that the classification could not be challenged until the administrative process was complete. Then the *Billings* case decided that under the regulations then in effect, because one was not acceptable until after the physical which was given at the time and place of induction, a challenge could not be made until after the physical examination and acceptance by the Army. Thereafter the Act (by Sec. 5 of Public Law 197, 78th Cong., approved Dec. 5, 1943, 50 U. S. C. A. Appx. 304a, 11 F. C. A. 50, Appx. 5) and the Selective Service Regulations were amended to require the pre-induction physical examination and acceptance by the Army prior to the induction. And so the *Dodez* case rightly decided that by virtue of this change in procedure the registrant who has passed his pre-induction physical examination and been found acceptable need not report for induction in order to challenge his classification at a criminal trial. For that would stretch "the requirement of exhausting the administrative process beyond any reason supporting it" (91 L. Ed. (Adv.) 282, 288).

If the local board could, notwithstanding the change in the Law and Regulations, order a registrant to report more than 90 days after the now invalid pre-induction examination, the very evil sought to be eliminated by the change is still with us. There would still be no finality. Registrants would once again face the specter of closing

their business and making all final arrangements only to discover that it was all for naught should they not pass the examination at the induction station.

That this was just what was sought to be eliminated is seen from the following excerpts from the proceedings in the Senate (89 Cong. Rec., pp. 8079, 8130, 8131):

"Mr. Bushfield (of South Dakota, who introduced the amendment.) (P. 8079):

". . . By way of explanation, let me say that most of the men whose classifications the Senate has been discussing have established homes, businesses, or professions. The record of the Selective Service indicates that forty and a fraction per cent of all men called in the United States during the month of August (1943) were deferred because of physical defects. In fairness to the group of men who are about to be called if the proposed legislation is not passed, we should afford them every possible opportunity to ascertain in advance whether they will be accepted; because it will be found that 4 out of every 10 men in the class which is to be called will be returned to their homes as unacceptable. In most cases those men will have either sold their businesses, closed their offices, or lost their jobs; and it is not fair to call them and later return them to their homes, if there is an opportunity to ascertain in advance whether they are acceptable. . . ."

(Page 8130):

"I say to the Senate that, inasmuch as we have adopted the policy, it is unfair to the heads of families to force them to close their offices or give up their jobs before they are ordered to the induction centers. We should do everything possible to avoid the situ-

ation of having a man give up his job but subsequently, because he does not pass the physical examination at the induction center, return to his home and have to look for a new job or have to open up another business."

Mr. Barkley (Kentucky) (P. 8131):

"The examination to determine their fitness takes place before they are inducted. . . . I have had my attention called to cases in which the local draft boards passed men. They went up to their induction centers, were examined, and rejected because of a more or less minor physical defect, which in all probability could be removed within 60 or 90 days, or which might be cured by nature. They were told that they were not fitted at that time to enter the service, and therefore they were not inducted, but they were ordered to report back within 60 days, or told that they would be called back in 60 days or 90 days to determine whether by that time the physical defect had been removed. Under the terms of the Senator's amendment the examination before the induction would be final. . . ."

And so the Amendment as finally passed (50 U. S. C. App. 304a, 57 Stat. 599) reads in part:

"Those registrants who are classified as 1-A at the time of such (pre-induction) physical examination *and who are found physically qualified for military service as a result thereof, shall remain so classified and report for induction in the regular order.*" (Italics added.)

Thus, if the validity of petitioner's pre-induction physical examination had expired, the local board had no au-

thority to order him for induction unless and until he had taken and passed another examination and had again been found acceptable to the Army. The Board having failed to do this, its order was void and need not have been obeyed.

C. The Concept of the End of Administrative Process Should Not be Carried to a Point of Unreasonableness.

As indicated in *Falbo v. United States,* 320 U. S. 549, the reason for the rule that a defendant in a criminal action cannot question his classification before having completed the administrative process is that before he has done so there is no basis for assuming that he actually would have been inducted. Because of the necessity, at the time, for the physical examination he "may still (have been) rejected at the induction center."

In *Dodez v. United States,* 91 L. Ed. (Adv.) 282, it was pointed out that there was no need to stretch "the requirement of exhausting the administrative process beyond any reason supporting it." This case was decided *after* the change in the Law and Selective Service Regulations. The two cases are thus perfectly in accord. And it would seem that the logic of the *Dodez* case is equally applicable here where the appellant knew he had been accepted by the Army and knew that in his own conscience he could not be inducted. Assertedly there is no "reason supporting" a rule requiring a needless dragging out of the process to compel a registrant to re-appear and go through

the very same examination. Particularly is this true in the light of the Selective Service Law and Regulations which petitioner must be presumed to have known. It is not to be presumed, however, that he knew or should have known of an obscure Army Regulation. The existence of this regulation is not known even to the general public. And most certainly this petitioner, whose conscience would permit him to have nothing to do with the military, could not be expected to know of it.

The citation by the lower court of the *Falbo* case can only be to the effect that one cannot challenge his classification until after he had completed the administrative process. It has no bearing on *when* the administrative process is complete.

The *Balogh* case, however, does seem to bear on this point. This court's memorandum opinion in 91 L. Ed. (Adv.) 428, did not indicate where or why the administrative process had not been completed. Since that time, however, that case was reconsidered by the 2nd Circuit Court of Appeals in 160 F. (2d) 999, and decided to the same effect as did the court below in the instant case. This court denied certiorari (91 L. Ed. (Adv.) 555). It is suggested that the *Balogh* case represents an erroneous view of the law and that a consideration by this court is necessary in order to adequately secure their "day in court" for persons caught in the "trap" such as was petitioner herein.

Conclusion.

Petitioner's conviction having been affirmed by the lower court on an erroneous interpretation of a procedural point, this court should grant certiorari to correct that error and afford to petitioner the opportunity to have his case decided on the merits by that court.[5]

It is therefore respectfully requested that the Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit be granted.

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[5]*Markham v. Allen*, 326 U. S. 490.